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NOTE

Walking Out on the Check: How Missouri Abandoned Its Public Defenders and Left the Poor to Foot the Bill

State ex rel. Missouri Public Defender Commission v. Pratte, 298 S.W.3d 870 (Mo. 2009) (en banc).

CHRIS DANDURAND*

November 2008

*"We're on the verge of collapse."*¹ – J. Marty Robinson, Director of the Missouri State Public Defender System.

March 2009

*"I think it burns you out. . . . [I]t was just an ongoing amount of wear and tear that just wore you out."*² – Kevin O'Brien, on leaving the Missouri State Public Defender System after ten years.

October 2009

*"And so each day in Missouri, the State places the lives of poor citizens into the hands of attorneys who are underpaid, overworked, and badly supervised."*³ – Assessment of the Missouri State Public Defender System prepared by The Spangenberg Group.

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1. Erik Eckholm, *Citing Workload, Public Lawyers Reject New Cases*, N.Y. TIMES, Nov. 8, 2008, at A1, available at <http://www.nytimes.com/2008/11/09/us/09defender.html>.

2. Jackie Schulte, *Boone County Public Defender's Office Loses Two Seasoned Attorneys*, COLUMBIA MISSOURIAN, Mar. 12, 2009, <http://www.columbiamissourian.com/stories/2009/03/12/public-defenders-leave-office>.

3. THE SPANGENBERG GROUP & THE CTR. FOR JUSTICE, LAW & SOC'Y AT GEORGE MASON UNIV., ASSESSMENT OF THE MISSOURI STATE PUBLIC DEFENDER SYSTEM 66 (2009), available at <http://members.mobar.org/pdfs/public-defender/2009-report.pdf> [hereinafter THE SPANGENBERG GROUP].

I. INTRODUCTION

The Missouri State Public Defender System (MSPD) is at a tipping point. Every day, public defenders risk violating standards of professional responsibility and fight claims of ineffective assistance of counsel.⁴ New attorneys enter the practice with ever-increasing amounts of law school debt and see little incentive to endure the work load of the public defender system for any longer than it takes to find a different job.⁵ In *State ex rel. Missouri Public Defender Commission v. Pratte*,⁶ the Supreme Court of Missouri acknowledged these problems and attempted to provide the MSPD with a means of keeping the state's indigent defense system afloat. After all, the constitutions of the United States and the State of Missouri grant each Missourian the right to counsel in criminal prosecutions, regardless of the defendant's ability to pay.⁷

This Note looks at the *Pratte* decision, which arose primarily from the MSPD's most recent effort to cope with its drastically insufficient level of funding. In Missouri, as in many other states, the funding crisis has manifested itself in the form of extremely high caseloads for public defender offices.⁸ Straining to prevent a system-wide collapse, the Missouri Public De-

4. See THE CONSTITUTION PROJECT, NAT'L RIGHT TO COUNSEL COMM., JUSTICE DENIED: AMERICA'S CONTINUING NEGLECT OF OUR CONSTITUTIONAL RIGHT TO COUNSEL 6-7 (2009), available at www.constitutionproject.org/manage/file/139.pdf [hereinafter JUSTICE DENIED] (discussing obstacles faced by public defenders attempting to provide competent, diligent, and effective assistance of counsel as required by the Sixth Amendment).

5. THE SPANGENBERG GROUP, *supra* note 3, at 7 ("Because of the low public defender salaries, some offices were losing public defenders to the prosecutor's office."). Public defenders often cite the current state of the economy and the lack of meaningful jobs as the reason they do not leave the MSPD. *Id.* at 14. Low salaries have pushed some public defenders in Missouri to take on second jobs, such as pizza delivery, retail, bartending, truck driving, babysitting, and waiting tables. *Id.* at 15. One public defender bluntly stated: "[I]f you want to raise a family, buy a house and a car, that's not going to happen [if you are a public defender]." JUSTICE DENIED, *supra* note 4, at 63. Public defenders often see a lack of parity between a prosecutor's salary and their own. See Mary Sue Backus & Paul Marcus, *The Right to Counsel in Criminal Cases, A National Crisis*, 57 HASTINGS L.J. 1031, 1096-97 (2006); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 IOWA L. REV. 219 (2004).

6. 298 S.W.3d 870 (Mo. 2009) (en banc).

7. U.S. CONST. amend. VI; MO. CONST. § 18(a); see also *Gideon v. Wainwright*, 372 U.S. 335, 348 (1963).

8. See *Pratte*, 298 S.W.3d at 877. A 2006 report assembled by the Missouri Senate concluded that "the probability that public defenders are failing to provide effective assistance of counsel and are violating their ethical obligations to their clients increases every day." CORRECTED REPORT OF SENATE INTERIM COMMITTEE ON THE MISSOURI STATE PUBLIC DEFENDER SYSTEM (2007), available at

fender Commission (Commission) enacted regulations that gave each district office of the public defender the power to manage its caseload.⁹ These regulations effectively gave each district office the discretion to deny representation to indigent defendants who were otherwise entitled to counsel under Missouri law.¹⁰ When circuit court judges began rejecting public defenders' attempts to employ the regulations, several different public defenders and the Commission sued to enjoin enforcement of the trial courts' orders.¹¹

Pratte is a consolidation of three writs of prohibition filed against three separate Missouri judges. At the circuit court level, in *Pratte*, the public defender sought a writ of prohibition to prevent Judge Pratte from appointing the public defender to represent an indigent defendant in contravention of the Commission's regulations.¹² In *State ex rel. Missouri Public Defender Commission v. Hamilton*, the Missouri Court of Appeals, Western District, consolidated writs of prohibition against two judges, Judge Hamilton and Judge Oxenhandler; each writ sought to prevent the judge from appointing a public defender to represent an indigent defendant.¹³ At the Supreme Court of Missouri level, *Pratte* consolidated the writ against Judge Pratte and the writs against Judges Hamilton and Oxenhandler.¹⁴

In *Pratte*, the Supreme Court of Missouri recognized the critical nature of the situation at the MSPD and attempted to provide measures that would help reduce the demand for public defender services.¹⁵ While the court resolved the three writs of prohibition at issue in *Pratte*, a brief analysis of the court's suggestions leaves the MSPD with little reason to believe that assistance is on the way. It is unclear whether the legislature will respond to the opinion by providing the necessary funds of its own accord or if it will be the courts that ultimately provide the impetus for increased funding. However, the opinion does give rise to one fairly conservative prediction: excessive caseload litigation on behalf of the MSPD is not over in Missouri. The following discussion aims to clarify the implications of the Supreme Court of Missouri's attempt to manage the potentially disastrous – and fast-approaching – collapse of the Missouri State Public Defender System.

<http://www.senate.mo.gov/06info/comm/interim/MPDS.htm> [hereinafter REPORT OF SENATE INTERIM COMMITTEE].

9. *Pratte*, 298 S.W.3d at 878.

10. *Id.*

11. *Id.* at 873, 880.

12. *Id.* at 874.

13. Nos. WD70327 & WD70349, 2009 Mo. App. LEXIS 487 (Mo. App. W.D. Apr. 14, 2009).

14. *Pratte*, 298 S.W.3d at 874.

15. *Id.* at 887.

II. FACTS AND HOLDING

It is no secret that the Missouri State Public Defender System is overworked and underfunded.¹⁶ The office of the public defender faces a caseload crisis, caused in part by an ever-increasing number of prosecutions and a lack of commensurate increases in resources for the system.¹⁷ Noticing the predicament, in 2006, the Missouri Senate authorized an interim committee to study the state's public defender system.¹⁸ The committee found that six years had passed without the public defender's office adding any staff, yet the system's annual caseload totals rose by 12,000 cases.¹⁹ Further, the committee noted problems concerning attorney retention,²⁰ office management,²¹ and office space.²² The increasing caseload and inadequate resources led the Commission to seek a remedy, which in turn gave rise to the issues the court addressed in *Pratte*.

Under Missouri Revised Statutes section 600.017(10), the Missouri Public Defender Commission has the power to promulgate "any rules needed for the administration of the state public defender system."²³ In December of 2007, the Commission exercised this power by enacting title 18, section 10-4.010 of the Missouri Code of State Regulations (18 CSR 10-4.010) to create a protocol that limits the number of cases a district office of the public defender can accept.²⁴ This protocol comes into effect when the circuit court places the district office on "limited availability" status.²⁵ A district office

16. See REPORT OF SENATE INTERIM COMMITTEE, *supra* note 8; Justine Finney Guyer, Note, *Saving Missouri's Public Defender System: A Call for Adequate Legislative Funding*, 74 MO. L. REV. 335, 352 (2009).

17. *Pratte*, 298 S.W.3d at 877. "[I]n the early 1980s, one in 97 Missourians was under correctional control – either in jail or prison or on probation or parole. In 2007, by contrast, one in 36 was under correctional control, and 32 percent of those were incarcerated in prison or jail." *Id.* (footnote omitted).

18. *Id.*

19. REPORT OF SENATE INTERIM COMMITTEE, *supra* note 8.

20. *Id.* ("The Public Defender System . . . averag[es] a 20% turnover each year. Several of the reasons attorneys raised for leaving the system were excessive caseload, low salary, and lack of training.").

21. *Id.* ("Currently, almost all . . . attorneys in supervisor positions, carry full caseloads. . . . [T]he result is inadequate training, mentoring, and supervising of personnel.").

22. *Id.* ("[T]he office space is often inadequate.").

23. MO. REV. STAT. § 600.017(10) (2000). However, the rules may not conflict with Missouri statutes. *Pratte*, 298 S.W.3d at 882.

24. *Pratte*, 298 S.W.3d at 878; see also MO. CODE REGS. ANN. tit. 18, § 10-4.010(2)(A) (2007).

25. The rule provides:

When the director determines that a district office has exceeded the maximum caseload standard for a period of three (3) consecutive calendar months, the director may limit the office's availability to accept additional

acquires limited availability status when its caseload exceeds the maximum caseload standard permitted under 18 CSR 10-4.010 for three consecutive months.²⁶ In calculating a district office's maximum caseload, Missouri incorporates national standards approved by the National Advisory Council of the United States Department of Justice Task Force on the Courts in 1972.²⁷ The three writs of prohibition that form the issues in *Pratte* arose out of public defenders' attempts to limit their caseloads using the Commission's protocol as established by 18 CSR 10-4.010.²⁸

A. Facts in Writ Against Judge Pratte

In *Missouri Public Defender Commission v. Pratte*, the Commission, Director of the Missouri Public Defender System J. Marty Robinson, and District Public Defender Wayne Williams petitioned the Supreme Court of Missouri for a preliminary writ of prohibition seeking to restrain the trial court judge from appointing a public defender to a case.²⁹ The petitioners argued that Judge Pratte violated the Commission's caseload limiting rule – 18 CSR 10-4.010(2) – by appointing the public defender to represent an indigent defendant while the district office was certified as one of limited availability.³⁰ Title 18, section 10-2.010(2) (18 CSR 10-2.010(2)) of the Missouri Code of State Regulations prohibited access to public defender services for an indigent person who previously had retained private counsel;³¹ the defendant

cases by filing a certification of limited availability with the presiding judge of each circuit or chief judge of each appellate court affected.
MO. CODE REGS. ANN. tit. 18, § 10-4.010(2)(A).

26. *Pratte*, 298 S.W.3d at 879. Under the caseload standards, an assistant public defender has 1,752 available hours per year. *Id.* To calculate a district office's maximum allowable caseload standard, multiply the number of available hours per year (1,752) by the number of lawyers in the district office. *Id.* To determine a district office's actual caseload, the Commission determines the number of cases assigned to the office in each category of case type, then multiplies each case by the number of hours that a lawyer should normally devote to that type of case, and totals the numbers to determine the actual number of hours needed for attorneys to handle the caseload assigned to that district. *Id.* If the actual number of hours needed to handle the caseload is greater than the maximum allowable caseload standard in a district for three months, the district is placed on "limited availability." *Id.*

27. *Id.* at 878, app. A.

28. *Id.* at 880.

29. *Id.* at 881. The State had charged the defendant with first-degree assault and abuse of a child. *Id.*

30. *Id.*

31. MO. CODE REGS. ANN. tit. 18, § 10-2.010(2) (2007). The rule provides: The State Public Defender System shall not represent indigent defendants who have at any time during the pendency of the case retained private counsel. The public defender shall not be available to assume representation where private counsel is allowed by court order to withdraw from re-

in the case previously had retained private counsel paid for by his friends and relatives.³² After Judge Pratte overruled the individual public defender's motion to rescind the appointment, the petitioners filed a petition for a preliminary writ of prohibition in the Supreme Court of Missouri, and the court granted the writ.³³ The other two cases arose from different facts, but similarly challenged the validity of the Commission's rules.

B. Facts in Writ Against Judge Oxenhandler

Another regulation promulgated by the Commission, 18 CSR 10-4.010, permits a district on limited availability to designate categories of cases for exclusion after a consultation between the court, the prosecution, and the public defender's office.³⁴ Relying upon this regulation, the public defender office chose to exclude from its services representation of all new probation revocation cases in which a suspended execution of sentence had been previously imposed.³⁵ In a case immediately following the public defender office's decision, a defendant came before the court for violating probation under a suspended execution of sentence and requested a public defender.³⁶ In contravention of the Commission's rule, Judge Oxenhandler appointed the public defender's office to represent the indigent defendant.³⁷ The appointed public defender, the Commission, and Director Robinson responded by filing a petition for a writ of prohibition in the Missouri Court of Appeals, Western District, against Judge Oxenhandler.³⁸

First, the Western District consolidated the case with Judge Hamilton's case³⁹ and issued preliminary orders of prohibition to prevent both judges from proceeding further in the cases before them.⁴⁰ Subsequently, a three-judge panel concluded that Missouri Revised Statutes section 600.042.2 mandates that the State provide representation for indigent defendants facing probation violations and that the Commission cannot promulgate regulations in conflict with the statutory mandate.⁴¹ As a result, the court quashed the preliminary order of prohibition and denied the public defender's request to re-

presentation regardless of the cause for such order of withdrawal unless approved by the director.

Id.

32. *Pratte*, 298 S.W.3d at 881.

33. *Id.*

34. MO. CODE REGS. ANN. tit. 18, § 10-4.010(2)(C)-(E).

35. *Pratte*, 298 S.W.3d at 883.

36. *Id.*

37. *Id.* at 883-84.

38. *Id.* at 884.

39. See *infra* notes 43-49 and accompanying text.

40. *State ex rel. Mo. Pub. Defender Comm'n v. Hamilton*, Nos. WD 70327 & WD 70349, 2009 Mo. App. LEXIS 487, at *2 (Mo. App. W.D. Apr. 14, 2009).

41. *Id.*

strain Judge Oxenhandler's decision to appoint a public defender to the case.⁴²

C. Facts in Writ Against Judge Hamilton

As noted above, the Western District consolidated the writ against Judge Oxenhandler with the writ against Judge Hamilton.⁴³ In the case involving Judge Hamilton, the indigent defendant appeared without counsel after being charged with violation of probation.⁴⁴ Because the district was certified as one of limited availability, Judge Hamilton appointed District Public Defender Kevin O'Brien to represent the defendant in O'Brien's private capacity "as a member of the local bar."⁴⁵ O'Brien argued that Missouri Revised Statutes section 600.021.2 expressly disqualifies any public defender from appointment in his private capacity as a member of the local bar.⁴⁶ O'Brien filed a petition for a writ of prohibition in the Missouri Court of Appeals, Western District, which issued a preliminary writ prohibiting the judge from appointing O'Brien to represent the defendant.⁴⁷ Upon consolidation with the writ against Judge Oxenhandler, the Western District agreed with O'Brien and made the preliminary prohibition absolute as to Judge Hamilton, thereby restraining Judge Hamilton from appointing any public defender to represent an indigent defendant in that attorney's capacity as a member of the local bar.⁴⁸ The Supreme Court of Missouri took the case and consolidated Judge Pratte's case with the previously consolidated writs against Judges Oxenhandler and Hamilton.⁴⁹

42. *Id.*

43. *Id.*

44. *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 885 (2009) (en banc).

45. *Id.* Section 600.042.5(1) of the Missouri Revised Statutes provides that "[t]he director may . . . [d]elegate the legal representation of any person to any member of the state bar of Missouri." A district is certified as of limited availability by following a specified protocol. *See supra* notes 24-27 and accompanying text. When a district is certified as of limited availability, the district may begin turning away certain specified defendants. *See* MO. CODE REGS. ANN. tit. 18, § 10-4.010 (2007).

46. *See* Relators' Brief, *Hamilton*, 2009 Mo. App. LEXIS 487 (Nos. WD 70327 & WD 70349), 2009 WL 246306, at *38 (arguing that public defenders may not practice law except in their official capacity as public defenders).

47. *Hamilton*, 2009 Mo. App. LEXIS 487, at *2.

48. *Id.*

49. *Pratte*, 298 S.W.3d at 874.

D. Holding

Essentially, the petitioners filed two of the writs at issue in *Pratte* because in appointing the public defender to the cases, the trial court disregarded the Commission's rules.⁵⁰ The public defender filed the third writ because in appointing him in his private capacity, the trial court disregarded a Missouri statute.⁵¹

As a result, the court unanimously held that (1) the portion of the Commission's rule prohibiting public defender services for an indigent person who had previously retained counsel is invalid because a rule permitting such a categorical denial "contravenes the factors that, by statute, must be taken into account when determining eligibility" for the public defender's services;⁵² (2) the portions of the Commission's rule allowing the district public defender to choose categories of cases to be designated for exclusion from public defender representation is invalid because the Commission does not have the authority to promulgate rules that eliminate a category of indigent defendants whom Missouri law requires the public defender to represent;⁵³ and (3) the trial court lacks authority to appoint a public defender in his personal capacity because Missouri Revised Statutes section 600.021.2 "mandates that public defenders cannot be appointed in their private capacity."⁵⁴

III. LEGAL BACKGROUND

A. Compliance with the Sixth Amendment in Missouri

The Sixth Amendment to the United States Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defence."⁵⁵ In the 1942 case of *Betts v. Brady*, the Supreme Court of the United States held that this right was not guaranteed to defendants in state courts.⁵⁶ Twenty years later, however, the Court revisited

50. *Id.* at 880.

51. *Id.*

52. *Id.* at 882-83.

53. *Id.* at 885.

54. *Id.* at 886. Contrary to the State's position, the court concluded that Missouri Revised Statutes section 600.021.2 is not unconstitutional because "judges have the ability . . . to appoint almost any lawyer from The Missouri Bar to represent indigent defendants and ensure their constitutional right to counsel is met but not someone who also happens to be a public defender." *Id.* Thus, because enough other attorneys are available for appointment, prohibiting the appointment of O'Brien or other public defenders does not render the statute unconstitutional. *Id.*

55. U.S. CONST. amend. VI.

56. 316 U.S. 455, 461 (1942) ("The Sixth Amendment of the national Constitution applies only to trials in federal courts.").

this issue in the landmark 1963 case of *Gideon v. Wainwright*.⁵⁷ In *Gideon*, the State of Florida charged Clarence Earl Gideon with breaking and entering into a poolroom with the intent to commit a misdemeanor.⁵⁸ Gideon appeared in front of the trial court without funds or representation, requesting that the court appoint counsel for him.⁵⁹ The court denied the request, citing a Florida law that only required appointment of counsel when the defendant is charged with a capital offense.⁶⁰ In response to the court's denial, Gideon famously – and mistakenly at the time – responded, “The United States Supreme Court says I am entitled to be represented by Counsel.”⁶¹ Rejecting Gideon's bold assertion, the trial court then forced Gideon to represent himself, and the jury returned a verdict of guilty.⁶² On appeal to the U.S. Supreme Court, the Court reversed the *Betts* decision and declared it an “obvious truth” that “any person haled into court, who is too poor to hire a lawyer, cannot be assured a fair trial unless counsel is provided for him.”⁶³ Accordingly, the Court unanimously held that the Sixth Amendment compels state courts to provide counsel to all felony defendants who are unable to afford their own representation.⁶⁴ Gideon's case was remanded, and the State of Florida put him on trial again, this time with a defense attorney who secured an acquittal.⁶⁵

The Missouri Constitution also declares the right to assistance of counsel in criminal trials,⁶⁶ but the state has not always provided a system to adequately fulfill this right of the accused.⁶⁷ Throughout much of the state's

57. 372 U.S. 335 (1963).

58. *Id.* at 336.

59. *Id.* at 337.

60. *Id.*

61. *Id.*; see Corinna Barrett Lain, *Countermajoritarian Hero or Zero? Rethinking the Warren Court's Role in the Criminal Procedure Revolution*, 152 U. PA. L. REV. 1361, 1391 (2004).

62. *Gideon*, 372 U.S. at 337.

63. *Id.* at 344.

64. *Id.* at 343-44.

65. *Gideon v. Wainwright*, 153 So. 2d 299, 300-01 (Fla. 1963); Times Wire Services, *Gideon Happy After Acquittal in Famed Case*, ST. PETERSBURG TIMES, Aug. 6, 1963, at 1-B. “*Gideon* spurred proposals for a public defender system in Missouri.” *State ex rel. Mo. Pub. Defender Comm'n v. Pratte*, 298 S.W.3d 870, 875 n.7 (Mo. 2009) (en banc).

66. MO. CONST. art. I, § 18(a) provides:

That in criminal prosecutions the accused shall have the right to appear and defend, in person and by counsel; to demand the nature and cause of the accusation; to meet the witness against him face to face; to have process to compel the attendance of witnesses in his behalf; and a speedy public trial by an impartial jury of the county.

67. See *State v. Green*, 470 S.W.2d 571, 572-73 (Mo. 1971) (recognizing that Missouri lawyers have in the past fulfilled without compensation the state's obligation to provide counsel for indigent defendants).

history, private lawyers in Missouri provided representation to indigent defendants without compensation and without reimbursement for out-of-pocket expenses.⁶⁸ It was not until 1971, in *State v. Green*, that the Supreme Court of Missouri determined that the state's private lawyers should no longer shoulder the government's burden of providing assistance of counsel in criminal cases and essentially demanded that the Missouri legislature create a solution within a year.⁶⁹

The legislature responded to the Supreme Court of Missouri's mandate, and in 1972 Missouri enacted Missouri Revised Statutes Chapter 600, which created "a blended system of local public defender offices and appointed counsel programs under the auspices of a Public Defender Commission."⁷⁰ The statutory system created public defender offices in St. Louis and Kansas City and utilized paid appointments in the rest of the state.⁷¹ That same year, the U.S. Supreme Court granted certiorari in *Argersinger v. Hamlin* to address the widespread interpretation of *Gideon* that the Sixth Amendment only guaranteed assistance of counsel for felony charges or in jury trials.⁷² Rejecting that interpretation, *Argersinger* held that "absent a knowing and intelligent waiver, no person may be imprisoned for any offense, whether classified as petty, misdemeanor, or felony unless he was represented by counsel at his trial."⁷³ As a result, the line was clear for every judge: no accused shall be imprisoned unless counsel represents the accused at trial.⁷⁴

By 1981, the funding appropriated by the Missouri General Assembly to support the public defender system was running out before the end of each fiscal year.⁷⁵ In *State ex rel. Wolff v. Ruddy*, an appointed private attorney asked the court to compel the State of Missouri to pay her for the work she performed, even after the indigent defense funds had already dried up.⁷⁶ The court found that it did not have the power to compel such a result and instead held that it would compel members of the Missouri Bar to represent indigent defendants until the legislature chose to fix the lack of funding.⁷⁷ Taking into

68. *Id.*

69. *Id.* at 573 ("[T]his court, after [one year], will not *compel* the attorneys of Missouri to discharge *alone* 'a duty which constitutionally is the burden of the State.'") (emphasis added) (quoting *State v. Rush*, 217 A.2d 441, 446 (N.J. 1966)).

70. STATE OF MO. PUB. DEFENDER COMM'N, FISCAL YEAR 2009 ANNUAL REPORT 2 (2009), available at <http://publicdefender.mo.gov/about/FY2009AnnualReport.pdf> [hereinafter 2009 ANNUAL REPORT]. See generally MO. REV. STAT. §§ 600.011-.101 (2000) (creating the Missouri Public Defender Commission).

71. 2009 ANNUAL REPORT, *supra* note 70, at 2. Money from Federal Law Enforcement Assistance Grants and state-created "High Impact" grants funded the system. *Id.*

72. 407 U.S. 25, 27, 32 (1972).

73. *Id.* at 37.

74. *Id.* at 40.

75. See *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 65 (Mo. 1981) (en banc).

76. See *id.* at 64.

77. *Id.* at 65, 67.

account the “public service” nature of the profession and balancing the “obligation to deal fairly and justly with the members of the legal profession,” the court established temporary guidelines that required attorneys to accept cases without pay.⁷⁸ The court reasoned that both the community and Missouri’s interests were best served by guaranteeing the continued existence of the criminal justice system because without it “the guilty cannot be convicted nor the innocent be acquitted.”⁷⁹

Again the legislature responded, and in 1982 the Office of the Missouri State Public Defender was created as an “independent state department within the judicial branch.”⁸⁰ Missouri Revised Statutes section 600.042 authorized the director of each of the MSPD’s offices to determine whether an accused was indigent, and if so, to appoint a “contract counsel” to the case.⁸¹ Thus, the system of “appointed counsel” was replaced by a system of “contract counsel,” under which private practitioners received a fixed contract in exchange for taking on a particular area’s indigent defendant caseload.⁸² However, costs began rising in the contract counsel program, and the department struggled to find private practitioners willing to take on indigent cases for the fees paid by the MSPD.⁸³ The system underwent reorganization in 1989, eliminating contract counsel and replacing them with professional, full-time public defenders that staffed offices covering all counties within the state.⁸⁴ The MSPD continues to employ this system today.⁸⁵

B. Statutory Authority of the Commission

The General Assembly, through Missouri Revised Statutes section 600.017, delegates certain powers to the Commission in order to operate the public defender system.⁸⁶ Specifically, the Commission has the power to “[m]ake any rules needed for the administration of the state public defender system.”⁸⁷ The director of the MSPD also has the authority to “promulgate necessary rules, regulations and instructions . . . defining the organization of his office and the responsibilities of public defenders.”⁸⁸ However, the Commission and the director are only granted authority to promulgate neces-

78. *Id.* at 66-67.

79. *Id.*

80. MO. REV. STAT. § 600.019 (2000); 2009 ANNUAL REPORT, *supra* note 70, at 2.

81. State *ex rel.* v. Mo. Pub. Defender Comm’n v. Pratte, 298 S.W.3d 870, 876 (Mo. 2009) (en banc) (citing MO. REV. STAT. § 600.042 (1983)).

82. 2009 ANNUAL REPORT, *supra* note 70, at 2.

83. *Id.*

84. *Id.*

85. *Pratte*, 298 S.W.3d at 876.

86. MO. REV. STAT. § 600.017 (2000).

87. *Id.* § 600.017(10).

88. *Id.* § 600.042.1(8).

sary rules that do not conflict with statutes.⁸⁹ Indeed, it is well settled in Missouri law that a regulation conflicting with a statute or constitution must fall.⁹⁰ Therefore, the Commission must avoid conflict with the federal and state constitutions, as well as with state statutes.

IV. INSTANT DECISION

The Supreme Court of Missouri took jurisdiction in *Pratte* to address two issues: (1) whether the Commission exceeded the authority granted to it by section 600.017(10) in promulgating rules that categorically exclude certain defendants from representation⁹¹ and (2) whether the trial court exceeded the authority granted by Missouri Supreme Court Rule 31.02(a)⁹² in appointing the public defender in his private capacity “as a member of the local bar.”⁹³ When under appellate review such questions are a matter of law and are reviewed independently of the trial court decision.⁹⁴ In its opinion, the court first laid out a brief history of indigent defense services in Missouri.⁹⁵ Next, it analyzed and ruled on the writs of prohibition against the trial court judges.⁹⁶ Finally, the court suggested measures that the parties might take to relieve the MSPD’s excessive caseloads.⁹⁷

89. See *Pharmflex, Inc. v. Div. of Employment Sec.*, 964 S.W.2d 825, 829 (Mo. App. W.D. 1997).

90. *Johnson v. Labor & Indus. Relations Comm’n*, 591 S.W.2d 241, 244 (Mo. App. W.D. 1979).

91. See *State ex rel. v. Mo. Pub. Defender Comm’n v. Pratte*, 298 S.W.3d 870 (Mo. 2009) (en banc); see also *State ex rel. Teefey v. Bd. of Zoning Adjustment*, 24 S.W.3d 681, 684 (Mo. 2000) (en banc) (“[T]he reviewing court should hold the decision to be illegal and void if the [administrative body] exceeds the authority granted to it.”).

92. Mo. SUP. CT. R. 31.02(a) provides:

In all criminal cases the defendant shall have the right to appear and defend in person and by counsel. If any person charged with an offense, the conviction of which would probably result in confinement, shall be without counsel upon his first appearance before a judge, it shall be the duty of the court to advise him of his right to counsel, and of the willingness of the court to appoint counsel to represent him if he is unable to employ counsel. Upon a showing of indigency, it shall be the duty of the court to appoint counsel to represent him.

93. See *Pratte*, 298 S.W.3d at 885-86, 874; see also *State ex rel. Shaw v. Pro-vaznik*, 708 S.W.2d 337, 341 (Mo. App. E.D. 1986) (holding that a writ of prohibition is appropriate when the trial court has exceeded its authority in appointing a public defender).

94. *Pratte*, 298 S.W.3d at 881.

95. *Id.* at 875-80.

96. *Id.* at 880-86.

97. *Id.* at 886-89.

A. Writ Against Judge Pratte

The writ against Judge Pratte concerned a criminal defendant who had previously retained private counsel, but ran out of money and requested a public defender.⁹⁸ The judge appointed a public defender in violation of the Commission's rule withholding services from any defendant who had previously retained counsel, which prompted the public defender to file a motion to rescind the appointment.⁹⁹ The question before the court was whether the Commission had the authority to promulgate a rule that denied public defender services to any defendant who had retained a private attorney during the case.¹⁰⁰

First, the court acknowledged that the General Assembly vested certain powers in the Commission, including the authority to "[m]ake any rules needed for the administration of the state public defender system."¹⁰¹ The court noted that the Commission and the director's authority to create such rules was limited to the extent those rules could not conflict with existing statutes.¹⁰² The court also acknowledged section 600.086.1, which provides, "A person *shall* be considered eligible for representation [by the public defender] . . . when it appears from all the circumstances of the case . . . that the person . . . is indigent."¹⁰³ On the other hand, the Commission's rule aimed at reducing caseloads, 18 CSR 10-2.010(2), expressly disqualifies a defendant who "at any time during the pendency of the case retained private counsel."¹⁰⁴ Finally, the court noted that while the initial determination of indigency is left to the Commission, either party may motion the court to request a final determination of eligibility for a public defender.¹⁰⁵

In resolving the writ against Judge Pratte, the court determined that the restriction in 18 CSR 10-2.010(2) directly conflicted with the requirements of section 600.086, because "[a]lthough [section 600.086] grants the [C]ommission the power to determine indigency, 18 CSR 10-2.010 actually **denies representation to people who in fact may be indigent.**"¹⁰⁶ As such, the Commission's rule deeming a defendant ineligible because he had previously retained counsel was beyond the authority of the Commission.¹⁰⁷ Indeed, judges are required to follow the regulations created by the Commission,

98. *Id.* at 881; *see also supra* Part II.A.

99. *Pratte*, 298 S.W.3d at 881. Judge Pratte overruled the motion, and the public defender petitioned the Supreme Court of Missouri for a writ of prohibition. *Id.*

100. *Id.*

101. *Id.* at 881-82 (citing MO. REV. STAT. § 600.017(10) (2000)).

102. *Id.* at 882 (citing *Pharmflex, Inc. v. Div. of Employment Sec.*, 964 S.W.2d 825, 829 (Mo. App. W.D. 1997)).

103. *Id.* (alteration in original) (citing MO. REV. STAT. § 600.086.1).

104. MO. CODE REGS. ANN. tit. 18, § 10-2.010(2).

105. *Pratte*, 298 S.W.3d at 882.

106. *Id.*

107. *Id.*

except when such regulations conflict with statutory law.¹⁰⁸ Therefore, any regulation categorically denying representation by a public defender must necessarily fall because it violates section 600.086.1; section 600.086.1 requires consideration of “all the circumstances.”¹⁰⁹ The court invalidated the conflicting language of 18 CSR 10-2.010(2), and then turned to the writ against Judge Oxenhandler.¹¹⁰

B. Writ Against Judge Oxenhandler

The writ against Judge Oxenhandler involved a criminal defendant who violated his probation under a suspended execution of sentence after the district had categorically excluded services for alleged probation violations.¹¹¹ The question for the Supreme Court of Missouri was “whether the public defender’s office has the right to restrict or eliminate a specified category of indigent defendants from representation when its office becomes overburdened.”¹¹²

The court indicated that section 600.042.4(3) requires the director and defenders to provide legal services to an indigent person “[w]ho is detained or charged with a violation of probation or parole.”¹¹³ It then pointed out that the Sixth Amendment right to counsel operates no differently for indigent defendants accused of violating their probation than it does for all other indigent defendants.¹¹⁴ The court interpreted 18 CSR 10-4.010 as permitting the districts to exclude a category of indigent defendants who are entitled to representation under Chapter 600.¹¹⁵ As a result, the court again held that the Commission lacked the authority to promulgate a rule categorically depriving a group of defendants of its statutory right to counsel.¹¹⁶ The court then proceeded to address the writ against Judge Hamilton.

108. *See id.* at 882-83.

109. *See id.*

110. *Id.* at 883. The court made a point to note that since none of the indigent defendants participated in the writ proceeding, the decision did not affect their individual rights to counsel from the public defender or otherwise. *Id.* at 883 n.29. As a result, the court directed the circuit court to reexamine whether the public defender should be appointed in light of the other factors discussed in the opinion. *Id.*

111. *Id.* at 883; *see also supra* Part II.B.

112. *Pratte*, 298 S.W.3d at 884. The Missouri Court of Appeals, Western District, found that Judge Oxenhandler did not abuse his discretion by appointing the public defender in contravention of the Commission’s rule against accepting probation violation cases. *State ex rel. Mo. Pub. Defender Comm’n v. Hamilton*, Nos. WD 70327 & WD 70349, 2009 Mo. App. LEXIS 487, at *23 (Mo. App. W.D. Apr. 14, 2009).

113. *Pratte*, 298 S.W.3d at 885; MO. REV. STAT. § 600.042.4(3) (2000).

114. *Pratte*, 298 S.W.3d at 885.

115. *Id.*

116. *Id.*

C. Writ Against Judge Hamilton

Like the writ against Judge Oxenhandler, the writ against Judge Hamilton involved a criminal defendant charged with the violation of his probation after the district had categorically excluded services for alleged probation violations.¹¹⁷ Instead of appointing the public defender in contravention of the Commission's regulation, Judge Hamilton appointed O'Brien, a public defender, to represent the defendant in his private capacity "as a member of the local bar."¹¹⁸ The question for the court was whether a judge has the authority to appoint a full-time public defender to represent an indigent defendant in that lawyer's private capacity.¹¹⁹

First, the court examined section 600.021.2, which provides, "[P]ublic defenders, assistant public defenders, and deputy public defenders . . . shall not otherwise engage in the practice of law except as authorized by this chapter or by commission rule."¹²⁰ According to O'Brien, section 600.021.2 indicates that public defenders do not have private capacities as lawyers.¹²¹ Next, the court examined Missouri Supreme Court Rule 31.02(a), which requires trial courts to appoint counsel to represent indigent defendants and which the State contended provided the trial judge with unlimited discretion to appoint O'Brien.¹²² The court agreed with O'Brien, concluding that reading both rules together indicates "the only lawyers a trial judge may appoint in their private capacities are those who are not also public defenders."¹²³

Further, the court noted that "[n]ot allowing O'Brien to be appointed in his private capacity does not effectively make section 600.021.2 unconstitutional."¹²⁴ Because Rule 31.02(a) provides trial judges with the authority to appoint almost any attorney from the Missouri Bar, the court determined that the fact that public defenders are excused from such appointments does not

117. *Id.*; see also *supra* Part II.C.

118. *Pratte*, 298 S.W.3d at 885; see also *supra* note 45 and accompanying text.

119. *Pratte*, 298 S.W.3d at 885-86. The Missouri Court of Appeals, Western District, found that "Judge Hamilton lacked the power and abused his discretion" in appointing the public defender as a member of the local bar because according to section 600.021.2 public defenders may only practice law in their official capacity as public defenders. *State ex rel. Mo. Pub. Defender Comm'n v. Hamilton*, Nos. WD 70327 & WD 70349, 2009 Mo. App. LEXIS 487, at *23-24 (Mo. App. W.D. Apr. 14, 2009) (citing MO. REV. STAT. § 600.021.2 (2000)).

120. *Pratte*, 298 S.W.3d at 885 (alteration in original) (citing MO. REV. STAT. § 600.021.2).

121. *Id.* at 886.

122. *Id.* at 885-86 (citing MO. SUP. CT. R. 31.02(a)). The State also contended that "because the . . . public defender's office was declining to take the case, there was no choice but to appoint O'Brien in his private capacity because the alternative would be to deprive [the indigent defendant] of his constitutional right to counsel." *Id.* at 886.

123. *Id.*

124. *Id.*

present a constitutional problem.¹²⁵ The court held that Judge Hamilton lacked the authority to appoint a full-time public defender in his private capacity as an attorney, and finally turned to the suggested remedies.¹²⁶

D. The Supreme Court of Missouri's Suggested Remedies

The Supreme Court of Missouri acknowledged that Missouri's public defender system suffers from legitimate problems, noting that "[a]s of July 2009, every Missouri public defender office was over its calculated capacity under 18 CSR 10-4.010."¹²⁷ After identifying the Sixth Amendment problems that an overburdened public defender system creates, the court revealed its parallel concern that "public defenders themselves are risking their own professional lives."¹²⁸ The court recognized the significance of such constitutional and ethical concerns, but noted that courts in this situation are "limited by principles that apply to regulatory takings and other deprivations of property without due process of law."¹²⁹

The court then pointed out its authority to require that lawyers accept their duty as members of the Missouri Bar to perform the public service of representing indigent defendants without compensation.¹³⁰ However, because the "troubling question" of providing such lawyers with compensation was not presented in the writ proceedings, the court was able to avoid the regulatory takings and due process issues that inevitably arise under such a scheme.¹³¹

At this point, the court, working within its limited authority, described the correct approach to 18 CSR 10-4.010 and, as discussed in the following

125. *Id.*

126. *Id.*

127. *Id.* at 880; see also *supra* notes 24-27 and accompanying text.

128. *Pratte*, 298 S.W.3d at 880. According to the American Bar Association, lawyers who represent indigent defendants are held to the same standard of competent and diligent representation as all other attorneys. *Id.* (citing ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 06-441 (2006) [hereinafter ABA Formal Op. 06-441] (discussing the ethical obligations of lawyers who represent indigent criminal defendants when excessive caseloads interfere with competent and diligent representation)). Nor does any exception to MODEL RULE OF PROF'L CONDUCT R. 4 exist in Missouri. *Id.* For further discussion of the overburdened public defender's ethical dilemma, see Peter A. Joy, *Ensuring the Ethical Representation of Clients in the Face of Excessive Caseloads*, 75 MO. L. REV. 771 (2010).

129. *Pratte*, 298 S.W.3d at 889.

130. *Id.*; see *Argersinger v. Hamlin*, 407 U.S. 25, 42 (1972) (noting the court's obligation to ensure that indigent defendants in criminal cases are afforded counsel); *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 66-67 (Mo. 1981) (en banc). Missouri attorneys accept this duty to an extent when they are sworn into the Missouri Bar. *Wolff*, 617 S.W.2d at 66.

131. *Pratte*, 298 S.W.3d at 889.

section, suggested potential measures for reducing caseloads that would pass muster under Missouri statutes.¹³²

Under 18 CSR 10-4.010, when a district exceeds its maximum caseload for three consecutive months, the district public defender should certify the office as of limited availability.¹³³ The district public defender must then notify the presiding judge and the prosecutors of the unavailability of services.¹³⁴ Upon receiving this notification, the district public defender, prosecutors, and presiding judge should then confer and work toward an agreement on measures to reduce the demand for public defender services.¹³⁵

The court then proceeded to lay out four potential remedies under the rule: (1) the prosecutor may agree to refrain from seeking incarceration in certain cases; (2) all three parties may agree to cases or categories of cases in which the court will appoint private attorneys; (3) the judges may choose not to appoint counsel in certain cases, with the result that those cases would be unavailable for trial or other disposition; or (4) if the judge and prosecutor cannot agree to any resolution, the public defender may make the office unavailable for appointments until the caseload falls below the maximum capacity.¹³⁶

The court noted that it had faced a similar problem almost thirty years prior in *State ex rel. Wolff v. Ruddy*¹³⁷ when insufficient funding impaired the state's ability to deliver effective representation to indigent defendants.¹³⁸ The *Wolff* court declared, and the court in the instant decision agreed, that "[a]s a necessary part of this system the accused is entitled to counsel and, where indigent, counsel must be provided. It is our first obligation to secure to the indigent accused all of his constitutional rights and guarantees."¹³⁹

V. COMMENT

While the decision in *Pratte* appears well reasoned and legally correct, one finds it difficult to see this case as a significant victory for anyone involved. Although the Supreme Court of Missouri recognized that a full-time public defender cannot be appointed in his private capacity, the court ultimately rejected the Missouri Public Defender Commission's attempt to limit its caseload.¹⁴⁰ In resolving the legal issues presented, the court sidestepped the insufficient funding problem that has long plagued the Missouri public defender system. As a result, an underfunded and overburdened system con-

132. *Id.* at 887.

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. 617 S.W.2d 64 (Mo. 1981) (en banc).

138. *Pratte*, 298 S.W.3d at 888 n.38.

139. *Id.* (quoting *Wolff*, 617 S.W.2d at 66-67).

140. *Id.* at 890.

tinues to limp along without any substantial guidance. To be sure, a significant portion of the decision in *Pratte* offered suggestions for how the system might limit its caseload within the protocol provided by 18 CSR 10-4.010.¹⁴¹ However, the questionable workability and effectiveness of these suggestions make it difficult for those involved to see a silver lining. Therefore, it is important to explore the court's proffered solutions and the implications each option could hold for Missouri's criminal justice system, public defenders, and individual communities within the state.

A. Prosecutors' Agreement to Limit Caseload

Under 18 CSR 10-4.010, the public defender, prosecutor, and presiding judge are supposed to confer when the public defender's office notifies the presiding judge and prosecutor of its impending unavailability due to exceeding the maximum caseload.¹⁴² At this conference, the court suggested, the prosecutor might "agree[] to limit the cases in which the state seeks incarceration."¹⁴³ Under *Argersinger v. Hamlin*, a defendant may not "be imprisoned for any offense, whether classified as petty, misdemeanor, or felony, unless he was represented by counsel at his trial."¹⁴⁴ The upshot of *Argersinger* is that when the prosecutor agrees beforehand not to seek incarceration for certain cases, the public defender is immediately relieved of any duty to represent indigent defendants charged with such offenses. This suggestion would likely save the most money, require the least effort on the state's part, and avoid much of the potential conflict inherent in other options. After all, there is no constitutional requirement to incarcerate every person that comes into contact with the criminal justice system.¹⁴⁵

An agreement to limit the cases in which the State seeks incarceration would improve working conditions at the overburdened public defender offices and conserve resources in the underfunded system. First, the public defender would see an immediate reduction in caseloads if the prosecutor agreed to limit the types of cases in which the State seeks incarceration. Next, the collaboration of the prosecutor, presiding judge, and public defender would likely result in a specific agreement, which would enhance predictability and enable a more streamlined system. The public defender could then analyze office statistics and reasonably predict the amount of time that it would be able to reallocate to cases in which the State does seek incarceration. Because of the prosecutor's agreement, the State would be spared the

141. *Id.* at 887.

142. MO. CODE REGS. ANN. tit. 18, § 10-4.010(2)(C) (2010).

143. *Pratte*, 298 S.W.3d at 887.

144. 407 U.S. 25, 37 (1972).

145. In fact, prosecutors enjoy "virtually unreviewable discretion to decline to prosecute or dispose of cases." Bennett H. Brummer, *The Banality of Excessive Defender Workload: Managing the Systemic Obstruction of Justice*, 22 ST. THOMAS L. REV. 104, 121 (2009).

expense of the public defender's time, and in the long run would likely be spared the cost of incarcerating defendants charged in the limited category of cases.

Unfortunately, the suggestion is fraught with workability issues. Theoretically, and in the views of the Supreme Court of Missouri and the Commission, a refined agreement should result from a sit-down between the overburdened public defender and the prosecutor, who already retains tremendous control over the existing burden.¹⁴⁶ While such an accord has the potential to grant relief to the overburdened public defender's office, experience in at least one other state demonstrates that this proposal is unrealistic. For example, prosecutors in Florida deny that a crisis even exists and have spent time and money arguing the issue in court.¹⁴⁷ It is not a stretch to suggest that prosecutors in Missouri might see the issue in a similar light as those in Florida. Indeed, the St. Louis County prosecutor has argued that the public defenders' position is "a contrived issue made up to get more money out of the Legislature and less work for themselves."¹⁴⁸ Additionally, the fact that Missouri's regulation *requires* prosecutors to attend the sit-down¹⁴⁹ tends to reveal a presumption that prosecutors would resist giving up any of their discretion. Realistically, prosecutors have little reason to yield to such requests.

146. *Pratte*, 298 S.W.3d at 887-88.

147. See Susannah A. Nesmith, *Attorneys for Dade's Poor Vow to Spurn Most Felony Cases*, MIAMI HERALD, June 3, 2008, at A1, available at <http://www.nlada.org/DMS/Documents/1212499257.33/555857.html>. Buddy Jacobs, General Counsel for the Florida Prosecuting Attorneys Association, was quoted as saying, "I hope the public defender will reconsider what we consider to be a rash action . . . [t]hey ought to work within the system rather than manufacture what we consider an unnecessary crisis." *Id.* In 2008, a circuit judge issued a ruling that would have lessened the public defenders' load by almost 11,000 cases a year. See Jordana Mishory, *Miami-Dade Public Defender Awaits Ruling*, LAW.COM, Feb. 8, 2010, <http://www.law.com/jsp/article.jsp?id=1202466622206>. The appellate court overturned the ruling, and, as of the time of this Note's publication, the Supreme Court of Florida has yet to rule on whether it will take jurisdiction of the case. *Id.* On the other hand, Erin Becker, Senior Deputy Prosecutor for King County, Washington, took it upon herself to limit some minor drug and theft cases to relieve the overburdened and understaffed public defender. Adam Gorlick, *Cases Pile Up as Public Defenders Stung by Budget Cuts*, STAN. REP., Apr. 1, 2009, <http://news.stanford.edu/news/2009/april8/indigent-public-defenders-budget-cuts-040809.html>. In Ventura County, California, prosecutors have been treating offenses such as driving without a license and minor drinking in public as infractions instead of misdemeanors. Raul Hernandez, *Public Defender's Office Close to Edge*, VENTURA COUNTY STAR, July 19, 2009, <http://www.vcstar.com/news/2009/jul/19/public-defenders-office-close-to-edge/>.

148. Editorial, *Trash Talking Won't Solve Missouri's Public Defender Crisis*, STLtoday.com, Aug. 1, 2010, http://www.stltoday.com/news/opinion/columns/the-platform/article_102b1cf4-9c2c-11df-a095-0017a4a78c22.html.

149. MO. CODE REGS. ANN. tit. 18, § 10-4.010(2)(C) (2010).

In addition to the public defender's lack of bargaining power, the suggestion that the parties come to an agreement to limit prosecution is subject to many prosecutors' need to maintain a "tough-on-crime" image. The lack of tangible incentives for the prosecutor to agree to any limitation threatens to short-circuit the court's first suggestion prior to any meeting between the parties. Absent a prosecutor's independent desire to ease the burden on his colleague, indeed his adversary, the required three-party conference lacks the equal bargaining power and incentives necessary to encourage any agreement that would significantly affect the current caseload crisis. In addition to the suggestion that the prosecutor agree to limit the cases in which the State seeks incarceration, the court also proposed a similar agreement regarding the appointment of private attorneys to indigent defendants.¹⁵⁰

B. Appointment of Private Attorneys

The court also suggested the participants at the conference "determin[e] cases or categories of cases in which private attorneys are to be appointed."¹⁵¹ The opinion included extensive discussion regarding a lawyer's "duty to perform public service without compensation" as a result of his membership in a "public profession."¹⁵² While the courts possess the authority to appoint members of the local bar to represent indigent defendants without pay, such authority is "limited by principles that apply to regulatory takings and other deprivations of property without due process of law."¹⁵³

An agreement to appoint private attorneys to represent indigent defendants in certain cases or categories has the potential to alleviate the burden on public defenders to the same degree as a prosecutor's agreement to limit the cases in which the State seeks incarceration. Again, the participants in the conference could analyze how much time the office spends on each type of case when deciding to designate specific cases for appointment. For example, if an office spends 300 hours every month on probation revocation hearings, the parties could agree to contract that category out to private attorneys. Such appointments would permit the particular office to reallocate around 300 hours of its own time to the remaining caseload. Unlike the suggestion that prosecutors agree to self-limitation, this proposition does not suffer from the same threat of immediate rejection by a prosecutor at odds with the public defender. However, the second suggestion may suffer from its own workabil-

150. *Pratte*, 298 S.W.3d at 887.

151. *Id.*

152. *Id.* at 889.

153. *Id.*

ity issues, in that appointed attorneys will inevitably demand payment¹⁵⁴ and ancillary spending is necessary in legal representation.¹⁵⁵

In *Pratte*, the court clarified the authority of the trial court and at the same time may have set the stage for the next round of caseload litigation. The court noted that “the only coercive remedy” available to trial courts is their ability to appoint members of the local bar.¹⁵⁶ Although appointing private attorneys to represent indigent defendants troubled the court because the funds simply do not exist, the court managed to avoid the issue because it was not squarely presented in the writ.¹⁵⁷ However, a number of courts in other states have confronted the issue of paying appointed attorneys by mandating that the State increase funding for public defender services.¹⁵⁸

In a similar public defender crisis case, the Supreme Court of Mississippi explained, “[W]here the Legislature . . . ‘fails to fulfill a constitutional obligation to enable the judicial branch to operate . . . effectively, then . . . the [j]udicial branch has the authority to see that courts do not atrophy.’”¹⁵⁹ The Supreme Court of Louisiana has recognized its inherent authority to “do all things reasonably necessary for the exercise of [its] functions.”¹⁶⁰ Similarly to the court in *Pratte*, the Supreme Court of Louisiana declined to exercise such authority and instead provided the legislature with the opportunity to either act or be acted upon.¹⁶¹ However, recall that the court in *Pratte* made clear its reluctance to order the legislature to provide funding.¹⁶² As a result, while Missouri courts may possess the authority to coerce private attorneys to represent indigent defendants, they lack the ability to pay those attorneys.¹⁶³ Thus, the court’s only coercive remedy is disconnected from any means of effective implementation. When trial courts begin appointing private attor-

154. The director may appoint members of the private bar if the assigned counsel is paid for his or her work. MO. REV. STAT. § 600.042(10) (2000).

155. Missouri has recognized that neither law nor professional ethics require an attorney to “advance personal funds in substantial amounts for the payment of either costs or expenses of the preparation of a proper defense of the indigent accused.” *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 67 (Mo. 1981) (en banc).

156. *Pratte*, 298 S.W.3d at 889.

157. *Id.*

158. JUSTICE DENIED, *supra* note 4, at 130-34.

159. *State v. Quitman County*, 807 So. 2d 401, 409-10 (Miss. 2001) (quoting *Hosford v. State*, 525 So. 2d 789, 798 (Miss. 1988)). The court recognized that while funding for indigent defense services is traditionally a matter for the legislature, a system funded so poorly that it handicaps the independence and effectiveness of the judiciary may require judicial interference and entitle a system to judicial relief. *Id.* at 410.

160. *State v. Peart*, 621 So. 2d 780, 790-91 (La. 1993) (quoting *Konrad v. Jefferson Parish Council*, 520 So. 2d 393, 397 (La. 1988)).

161. *Id.* at 791.

162. *Pratte*, 298 S.W.3d at 890 n.40.

163. See *supra* text accompanying notes 128-32 (authority to appoint is limited by takings and other regulations).

neys to represent indigent defendants without compensation, a constitutional conflict may,¹⁶⁴ and a statutory conflict inevitably will,¹⁶⁵ present itself: either the attorneys are deprived of compensation, or the defendants are deprived of their right to counsel.

While the first remedy suggested in *Pratte* requires the prosecutor to make a sacrifice in not seeking incarceration, and the second remedy requires the local bar to make a sacrifice in wages, the third and fourth suggestions might be categorized as more of a societal sacrifice.

C. Judges Limit Appointments

As a third alternative, the court suggested that trial court judges could determine “not to appoint any counsel in certain cases (which would result in the cases not being available for trial or disposition).”¹⁶⁶ This option essentially bars the prosecution from pursuing a case if the judge does not appoint counsel. Assuming a defendant does not waive the right to a speedy trial and the State is unable to bring the defendant to trial in a timely manner, the case may result in dismissal.¹⁶⁷ The failure to appoint counsel may also give the indigent defendant the right to seek relief in the appellate court.¹⁶⁸

The court stated that such a determination by the judge would occur during the conference between the public defender, prosecutor, and judge.¹⁶⁹ However, such a determination would ultimately consist of a unilateral decision by a judge to relieve the local public defender office.¹⁷⁰ On one hand, the unilateral nature of the decision gives the judge an opportunity to dramatically improve the caseloads in a single office without the need to orchestrate an agreement between the prosecutor and public defender. On the other hand, the judge may be hesitant to make substantive decisions about the types of cases in which to decline to appoint counsel.¹⁷¹ Under this suggested remedy, the public defender stands to benefit greatly depending on the types of cases the judge determines will not receive appointed counsel.

164. See *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (discussing the Takings Clause and compensation in relation to the value of property).

165. The director may appoint members of the private bar if the assigned counsel is paid for his or her work. MO. REV. STAT. § 600.042(10) (2000).

166. *Pratte*, 298 S.W.3d at 887.

167. *Id.* at 887 n.36 (citing *State v. Newman*, 256 S.W.3d 210 (Mo. App. W.D. 2008)).

168. *Id.*

169. *Id.* at 887.

170. *Id.* (“Such measures might include . . . a determination by the judges not to appoint any counsel in certain cases.”) (emphasis added).

171. The election pressure that many trial judges in Missouri face might further exacerbate such tension. See Sandra Day O’Connor, Earl F. Nelson Lecture at the University of Missouri Law Review Symposium: The Essentials and Expendables of the Missouri Plan (Feb. 27, 2009), in 74 MO. L. REV. 479, 486-87 (2009).

Unfortunately, the danger of allowing the State to charge a person but not appoint counsel stands to outweigh the relief granted to the public defender's caseload. First, an accused without counsel who does not make bail is at risk of being overlooked by the system or simply prosecuted without counsel.¹⁷² Second, an accused in this situation may be under pressure to waive, or may not know the importance of asserting, his Sixth Amendment right to a speedy trial.¹⁷³ The U.S. Supreme Court has held that the determination of whether a defendant's right to a speedy trial has been violated is made by an evaluation of factors, including "the reason for the delay."¹⁷⁴ Even if an indigent defendant asserts his right to a speedy trial in Missouri, he is attempting to force his way into a constitutionally overburdened public defender system. Consequently, if he claims that the State has violated his right to a speedy trial, the "reason for delay" factor likely weighs in the State's favor.¹⁷⁵ If the defendant chooses not to assert the right to a speedy trial because he has no desire to inject himself into the overburdened system, the "whether the defendant asserted his right" factor weighs in the State's favor as well.

If such a defendant is required to navigate these pitfalls without the appointment of counsel, as suggested by the court, he will be compelled to sacrifice either his Sixth Amendment right to effective assistance of counsel or his Sixth Amendment right to a speedy trial.¹⁷⁶ While these sacrifices may assist the public defender in meeting the ABA's standard that "[a] lawyer's primary ethical duty is owed to existing clients,"¹⁷⁷ the court's suggestion

172. See, e.g., Dan Christensen, *Hallandale Beach Grandma Sent to Jail - and Forgotten*, MIAMI HERALD, Jan. 11, 2010, <http://www.miamiherald.com/2010/01/11/1420180/hallandale-beach-grandma-sent.html>; Lewis Kamb, *Not Charged, Transient Spends 3 Months in Jail - Forgotten*, SEATTLE POST-INTELLIGENCER, Feb. 29, 2008, at A1, available at http://www.seattlepi.com/local/353358_actwilliams01.html; Adam Nossiter, *Arkansas Woman, Left in Cell, Goes 4 Days With No Food or Water*, N.Y. TIMES, Mar. 12, 2008, at A17, available at <http://www.nytimes.com/2008/03/12/us/12jail.html>. Poor people who are not appointed counsel are at risk of being prosecuted anyway or forgotten. See Rodney J. Uphoff, *Convicting the Innocent: Aberration or Systemic Problem?*, 2006 WIS. L. REV. 739, 750 n.58 (2006).

173. U.S. CONST. amend. VI. Missouri adopted a "speedy trial" statute to mirror the federal constitutional right. MO. REV. STAT. § 545.780 (2000).

174. *Barker v. Wingo*, 407 U.S. 514, 530 (1972). Four factors are considered: (1) length of the delay, (2) reason for the delay, (3) whether the defendant asserted his right, and (4) prejudice to the defendant. *Id.* Missouri considers the same four factors. *State v. Kirksey*, 713 S.W.2d 841, 844 (Mo. App. E.D. 1986).

175. This factor would favor the State because the delay was due to the State securing another defendant's constitutional right to adequate counsel.

176. U.S. CONST. amend. VI. "[A] defendant's failure to take affirmative action seeking a speedy trial constitutes a waiver of that right." *State v. Wright*, 476 S.W.2d 581, 585 (Mo. 1972) (quoting *State v. Harper*, 473 S.W.2d 419, 424 (Mo. 1971) (en banc)).

177. ABA Formal Op. 06-441, *supra* note 128, at 4.

clearly raises significant concerns for the accused who ends up being a client of no one.

D. The Nuclear Option

The final suggestion from the court, dubbed the “nuclear option” by one member of the Commission,¹⁷⁸ requires no agreement and likely will only be used by the public defender as a last resort.¹⁷⁹ If the prosecutors and judge cannot come to any agreement and thus do not provide relief to the district office on limited availability status, the regulation “authorizes the public defender to make the office unavailable for any appointments until the caseload falls below the [C]ommission’s standard.”¹⁸⁰ It is not difficult to see why such a course has been called the nuclear option. However, the court explained that while a district office’s decision to make itself unavailable “prevents the rejection of categories of cases,” it still allows the system to “manage its offices and control its caseload.”¹⁸¹

Similar to the suggestion that judges limit appointments, the nuclear option is a unilateral measure reserved to the guided discretion of each office.¹⁸² Engaging the “option” would have an immediate positive effect on defendants in the system by providing public defenders with a temporary reprieve from the perpetual bombardment of new cases. Such benefits do not come without cost, however, and two significant concerns arise.

First, while temporarily resolving the caseload crisis in the office, the nuclear option realistically just forces the line of indigent defendants to wait outside. While outside, the accused must weather the elements, including prosecutorial pressure, lack of closure in their cases, and the deterioration of exculpatory evidence. At the same time, nothing prevents the prosecutor from investigating and developing a case against the unrepresented defendant. While some may find it easy to ignore the plight of a defendant in such a situation, everyone ought to realize the harm that a community will suffer if the public defender’s office closes. Like the accused, the community has an interest in presenting its accused with a fair trial, complete with current evi-

178. William C. Lhotka & Derek Kravitz, *Public Defender Panel Backs off Proposal to Stop Taking Clients*, ST. LOUIS POST-DISPATCH, Mar. 3, 2007, at A21 (attributing the designation to Commissioner Eric Barnhart); see also Tara Cavanaugh, *Boone County Public Defenders Refuse Cases*, COLUMBIA MISSOURIAN, Oct. 19, 2008, <http://www.columbiamissourian.com/stories/2008/10/19/boone-county-public-defenders-refuse-certain-cases>.

179. The Missouri State Public Defender System has previously threatened such an approach. Cavanaugh, *supra* note 178.

180. *State ex rel. Mo. Pub. Defender Comm’n v. Pratte*, 298 S.W.3d 870, 887 (Mo. 2009) (en banc).

181. *Id.*

182. An office must follow the protocol outlined in *Pratte* before exemption from appointment is possible. *Id.*

dence and quality representation. Communities face the potential harm of guilty people being set free simply because the State was unable to put the person on trial. Finally, the need for closure when a crime is committed is present within a community and its crime victims just as it is within the accused.

Recognizing that the community has a stake in this solution presents a second concern – when an office closes, how should the community respond? The answer is not obvious. The opinion gives no guidance on exactly what judges, prosecutors, and criminal defendants are supposed to do when the public defender denies all appointments. It is unclear if a prosecutor reacting to the “nuclear option” will be forced to dismiss cases and let accused people back into the community before a disposition by the court. It is clear, however, that defendants left out by the “nuclear option” will likely suffer the same consequences as defendants receiving the “Judges Limit Appointments” treatment discussed above.¹⁸³ Paradoxically, by taking action to guarantee today’s defendant his Sixth Amendment right to counsel, the State guarantees that tomorrow’s defendant suffers the ills that *Gideon* once aimed to cure.

VI. CONCLUSION

In *State ex rel. Missouri Public Defender Commission v. Pratte*, the Supreme Court of Missouri recognized, as it has before,¹⁸⁴ the inadequacy of the resources provided for indigent defense services and the court’s unwillingness to compel the legislature to act.¹⁸⁵ Speaking to the problems poor defendants face, Robert Kennedy once said, “The poor man charged with [a] crime has no lobby.”¹⁸⁶ Contrary to Kennedy’s statement – and as unlikely as it may seem – advocates for change in Missouri have been vocal.¹⁸⁷ Judge William Ray Price, Jr., Chief Justice of the Supreme Court of Missouri, delivered

183. See *supra* Part V.C.

184. See *Sullivan v. Dalton*, 795 S.W.2d 389, 391-92 (Mo. 1990) (en banc) (“[T]he primary authority and responsibility for relieving the problem of limited public defender resources remains with the General Assembly.”); *State ex rel. Wolff v. Ruddy*, 617 S.W.2d 64, 65 (Mo. 1981) (en banc) (“The cupboard is bare.”); *State v. Green*, 470 S.W.2d 571, 573 (Mo. 1971) (en banc) (“The question is whether the legal profession must continue to bear th[e] burden [of providing gratuitous indigent defense services] alone.”).

185. *Pratte*, 298 S.W.3d at 873. But see *Green*, 470 S.W.2d at 577 (Finch, C.J., dissenting) (“[T]he court ha[s] an inherent right to order payment of the attorneys’ fees and expenses as court costs.”).

186. EDWARD M. KENNEDY, *AMERICA BACK ON TRACK* 160 (2006).

187. For example, David Webber, University of Missouri Associate Professor of Political Science, has outlined a plan to increase political support for the problems facing the public defender system in Missouri. David Webber, *Improving Public Defender System is Predicament for Missouri*, COLUMBIA MISSOURIAN, Mar. 18, 2010, <http://www.columbiamissourian.com/stories/2010/03/18/column-improving-public-defender-system-predicament-missouri/>.

the 2010 State of the Judiciary Address to the Missouri General Assembly and spoke at length about the state's criminal justice system.¹⁸⁸ In his comments, he captured the heart of the issue, stating, "It does no good . . . to arrest criminals if you don't know what you are going to do with them, or you cannot afford to do what you should with them."¹⁸⁹ The University of Missouri School of Law hosted a symposium in February of 2010 entitled "Broke and Broken: Can We Fix Our State Indigent Defense Systems?," which brought together a variety of perspectives to publicly address the crisis.¹⁹⁰

Beyond merely directing the public's attention to the crisis, the Chief Justice of the Supreme Court of Missouri has spoken out on the issue, the Governor of Missouri has made a proposal to the legislature, and nationally prominent legal academics have put forth their own suggestions. Chief Justice Price, addressing the Missouri General Assembly, declared the solution to be relatively simple: "[E]ither increase the public defender's funding or tell the defender who to defend and who not to defend."¹⁹¹ Chief Justice Price opined that the over-incarceration of nonviolent offenders is the biggest waste of resources in state government, called for a reevaluation of sentencing strategy, and pleaded for an immediate increase in spending in drug courts, which have resulted in "tremendous savings" for the court system.¹⁹²

Governor Jay Nixon proposed a \$2 million increase to the budget of the public defender system for the 2011 fiscal year.¹⁹³ The proposal is simply for "management of caseload growth" and permits public defenders to use the resources as they see fit to manage their caseloads.¹⁹⁴ While expressing gratitude for the "significant down payment on the resources that are needed to fix the system," Deputy Director of the Public Defender System Cat Kelly noted that "[t]wo million dollars isn't going to solve all of our problems by any means."¹⁹⁵

Professor Darryl Brown has proposed a system where public defenders funnel greater resources toward the defense of those deemed "likely inno-

188. William Ray Price, Jr., Chief Justice of the Missouri Supreme Court, 2010 State of the Judiciary Address, (Feb. 3, 2010), in 66 J. MO. B. 68, 68-72 (2010), available at <http://members.mobar.org/pdfs/journal/2010/mar-apr/judiciary-address.pdf>.

189. *Id.* at 69.

190. See generally 75 MO. L. REV. 667 (2010); Matt Pearce, *Legal Experts Discuss Public Defender Crisis at MU School of Law*, COLUMBIA MISSOURIAN, Feb. 28, 2010, <http://www.columbiamissourian.com/stories/2010/02/28/legal-experts-discuss-public-defender-crisis/>.

191. Price, *supra* note 188, at 69.

192. *Id.* at 70-71.

193. Scott Lauck, *Missouri Governor Jay Nixon Seeks Cut for Judiciary, Increase for Defender System*, MO. LAWYERS MEDIA, Jan. 21, 2010, <http://www.allbusiness.com/government/government-bodies-offices-heads-state/13816012-1.html>.

194. *Id.*

195. *Id.*

cent.”¹⁹⁶ While the proposal arguably comports with neither the central principle of the right to counsel under the Sixth Amendment nor the rules of professional ethics,¹⁹⁷ the creative solution at least reflects another view on how to address the problem.

The evidence couldn't be clearer: as a direct result of inadequate funding, Missouri's public defenders are struggling to maintain the promise of *Gideon*. The ink on the Bill of Rights, particularly the Sixth Amendment, fades as each indigent defendant in the system receives lower quality representation than the defendant prior. The U.S. Constitution is not optional, but nevertheless, fulfillment of the Sixth Amendment is left to the legislature in Missouri. As a result, the Supreme Court of Missouri has spoken, the Chief Justice has made requests, the public defenders have pleaded, and the academics have written. The solutions have been put forth – from increased funding to abolishing the death penalty¹⁹⁸ – and there is only one party left to act. The Missouri General Assembly must address the overburdened and underfunded indigent defense system in the state, lest they wish to see a decaying system fall to pieces in front of their eyes.

196. Darryl K. Brown, *Rationing Criminal Defense Entitlements: An Argument from Institutional Design*, 104 COLUM. L. REV. 801, 801 (2004).

197. Robert P. Mosteller, *Protecting the Innocent: Part of the Solution for Inadequate Funding for Defenders, Not a Panacea for Targeting Justice*, 75 MO. L. REV. 931, 963-64 (2010) (suggesting that Professor Brown's proposed system requires accepting a premise that does not "fit" with the Sixth Amendment and would not garner much support among those who work as defenders).

198. Rodney Uphoff, *Foreword*, 75 MO. L. REV. 667, 674, 676 (2010).

